FILE COPY

In the

Supreme Court of the United States

October Term, 1973.

No. 73-1507

STANLEY A. LUKAS,

Petitioner,

v.

THE STATE OF DELAWARE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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IN THE

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No. .

STANLEY A. LUKAS,

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v.

THE STATE OF DELAWARE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

Petitioner prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of the State of Delaware entered in the above captioned case on February 1, 1973 (Petition for reargument denied on February ~~15~~ 1973).

CITATION TO OPINION BELOW.

The opinion of the Supreme Court of the State of Delaware was reported as No. 151, 1972. Said opinion is set forth in Appendix "A" attached hereto.

JURISDICTION.

The judgment[1] of the Supreme Court of the State of Delaware was entered on February 1, 1973. A timely motion for Reargument was denied on February 15, 1973 and notice thereof given by letter dated February 20, 1973. (See Appendices "B" and "C" attached hereto.)

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3).

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1. Under Delaware practice the opinion of the Supreme Court ending in notations "denial of the motion below will be affirmed, "along with the denial of the motion for reargument, constitutes the judgment.

QUESTION PRESENTED.

1. WHETHER THERE CAN BE A CONVICTION FOR RECEIVING GOODS OF A VALUE IN EXCESS OF $100.00 WHERE NO EVIDENCE IS ADDUCED IN SUPPORT OF VALUE OF THE GOODS WHERE RECEIVED.

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provision involved is the Due Process Clause found in Section 1 of the Fourteenth Amendment to the Constitution of the United States which forbids a trial court from permitting a jury to speculate when there exists no factual basis as to a material element of the crime charged.

STATUTES INVOLVED.

Delaware Statutes 11 Del. C. § 791, § 793, § 633.

"§ 791. Receiving stolen property valued at $100 or more

Whoever buys, receives or conceals any money, goods, or other things being the subject of larceny, to the value of $100 or more, which have been stolen or taken by robbery, knowing the same to have been stolen or taken by robbery, is guilty of a felony, and shall be imprisoned not more than 3 years."

"§ 793. Valuation of stolen property received

In all prosecutions under this subchapter, the value of goods and other things being the subject of larceny shall be determined as is provided by law with respect to prosecutions for larceny."

"§ 633. Valuation of property subject to larceny

In all prosecutions for larceny, the value of promissory notes, bank notes, bills of exchange, bonds, and other evidences of debts shall be deemed the sum of money due thereon or secured thereby and remaining unsatisfied; the value of obligations or written securities for the delivery of goods or merchandise shall be deemed the market value or replacement costs of such goods or merchandise; the value of warrants of attorney or other instruments, authorizing the receiving of money, shall be deemed the sum of money to be received thereunder; and the value of releases or receipts, discharging or acquitting any debts or demands, shall be deemed the amount of the debts or demands discharged or acquitted thereby, *and with respect to all other things being the subject of larceny, the value shall be the market value or replacement cost . . .*" (Emphasis supplied.)

STATEMENT OF FACTS.

Stanley A. Lukas was convicted by the Superior Court of Delaware as a felon for receiving stolen property allegedly valued in excess of $100.00, in violation of 11 Del. C. 791. The Supreme Court of Delaware affirmed his conviction and two year probationary sentence on February 1, 1973 (Motion for reargument denied February 15, 1973).

At trial, evidence was presented showing that Lukas had possession of twelve brake drums and partial axle parts. These parts had been cut from six axle assemblies by the thief who left the center parts of each assembly at the site of the theft. No evidence was adduced at trial to show the value of the property as received by Lukas. The only testimony which related to value of the property, when and where received by Lukas, was to the effect that eleven of the twelve parts were returned to the assembly manufacturer who sold them as junk (Appendix D). The recovered property was sold in conjunction with other junk including other metal. No testimony was adduced to show even the junk value of the parts; but generally scrap steel sells for $1.00-$1.50 per 100 pounds.

Evidence was presented to show the value of the original axle assemblies prior to destruction and removal by the thief. The lower court permitted the jury to speculate on the value of the parts as received by Lukas. The Supreme Court of Delaware also relied upon evidence of the replacement value of the original assemblies rather than the value of the specific parts received by Lukas (where received) in affirming the conviction. They supported their conclusion by noting that evidence was presented which showed Lukas paid $300.00 for the parts. In fact the testimony referred to was Corporal Benert's testimony of Lukas' alleged admission that he paid a combined price of $300.00 for the parts plus a number of other items (Appen-

dix E). Thus it is clear that no testimony was adduced showing either the price Lukas paid for the axle parts or their value when received by Lukas other than that the articles were subsequently sold for junk, (approximately $6.00-$9.00).

REASONS FOR GRANTING THE WRIT.

1. This Case Presents the Question of Whether the Constitutional Guarantee of Due Process of Law Is Violated Where a Conviction for the Felony, of "Receiving Stolen Property Valued at $100.00 or More" (11 Del. C. § 791) Is Permitted to Stand Even Though No Evidence Whatsoever Was Adduced at Trial as to the Value of the Goods Found in fendant's Possession.

This conviction has resulted in nding Mr. Lukas as "a felon". Loss of his livelihood as well as valuable personal rights will result if the conviction is not reversed. Mr. Lukas is business manager of Local Union 1545 of Carpenters International Union and serves on the Delaware Labor Council as well as the Building Trades and Construction Council. This is his livelihood. As a felon Mr. Lukas will not be permitted to serve as a union officer for a period of five years nor will he be permitted to vote or even own a gun for his own protection. Livelihood and valuable rights of a citizen of the United States may not be stripped from him by any court which fails to guarantee due process in application of the law.

The law, 11 Del. C. § 791, under which Mr. Lukas was tried, makes it a felony to receive stolen property in value of $100.00 or more. As an essential element of proving felony crime, the state must specifically plead and prove the value of the property involved. This duty is so pervasive that it is not challenged in any jurisdiction; an equally compelling duty which is shared by larceny and receiving stolen goods statutes as well as the National Stolen Property Act (18 USCS § 2314), 76 C. J. S. Receiving Stolen Goods, 52A C. J. S. Larceny § 118, 147, 66 Am. Jur. 2d § 43. Indeed application of the rule is so universal that research discloses no Supreme Court case where it was necessary to decide the exact question presented.

The duty of the State to prove value beyond reasonable doubt was emphasized by the Court of Appeals of Maryland in *Coffin v. State of Maryland,* 186 A. 2d 216 (1962). There a conviction for grand larceny was reversed for lack of sufficient evidence of value of the goods stolen. The State had failed to prove value by testimony of an appraiser. The court noted the goods were not of a type whose value was a matter of common knowledge, so speculation as to value was prohibited.

Valuation of property received under 11 Del. C. § 791 is dictated by § 793 relating back to the larceny statute, § 633, which says in vital part. . . . "with respect to all other things being the subject of larceny, the value shall be the market value or replacement cost."

A critical point is that § 793 speaks to evaluation of stolen property received by a defendant. Consequently § 633 requires that the value of the things actually received is to be determined by established market value or replacement cost. This requirement is consistent with the general principle that where the value of goods received is important in classifying the offense, it is requisite to show the value of property received. See 76 C. J. S. Receiving Stolen Goods § 5.

Justice Carey pointed out in the Delaware Supreme Court opinion in the instant case on appeal that proof of the value of the things was an element, essential to proof of the felony alleged.

In Delaware it is held that the crime of theft and the crime of receiving stolen property are two distinctly separate crimes; *State v. Bean,* Del. Super. 113 A. 2d 875 (1955). This distinction was true at common law and has been endorsed by most jurisdictions today. 76 C. J. S. Receiving Stolen Goods § 1.

The receiver of stolen property does not participate in the endeavor of the thief as an accomplice might. His

crime is the mere receipt, with criminal intent, of property known to be stolen. Where statutes distinguish the higher degree of the crime of receiving stolen property, it is always necessary for the State to produce credible evidence establishing the additional element of value of the property, where received, in order to prove a higher crime than the simple crime of receipt; *People v. Todaro,* Ill. 153 N. E. 2d 563 (1958). 76 C. J. S. Receiving Stolen Goods 17, 18, 19, 23.

The receiver of stolen property has no part in the industry of the thief who alters property or changes its value. Although petit or grand larceny may be established by proving value of the property prior to taking or alteration by the thief, the receiver can only be charged with the value of property actually received after alteration by the thief. Consequently, the critical value which must be proven to establish the felony of receiving stolen property of value of $100.00 in Delaware is the value of the property, received by the defendant, in the form and at the time and place where it was received. The Court should clearly instruct the jury that the property received by the defendant must be proved by the State to have a value of $100.00 or more when it is received. There was a failure of proper clear instructions to the jury in the court below. This case is not one of close valuation. If the State has not proven the value of the articles received the jury may not find the defendant guilty of the felony charged. The jury may not speculate as to the value of the articles received. The challenge here is based on the claim that no evidence was adduced to establish the value of the property actually received by the defendant. As a consequence there was a total failure on the part of the State to establish the value of articles allegedly received. Instead, the State established that the allegedly stolen property found in the possession of the defendant was worthless except as junk. (We may

deduce the value of 600-800 pounds of junk to be less than $10.00 but not even evidence of that junk value was presented by the State.)

The value of the articles as established by the jury was therefore, purely speculative and not based on evidence presented or proved by the State. The jury certainly may not engage in the speculation that value of the articles is above $100.00 when the State failed to prove the requisite value and indeed proved facts indicating value of the received items was less than $10.00.

The petitioner's constitutional right of Due Process has been betrayed. Speculative conclusions by the jury, impossible of foundation on the facts presented by the State, may not be permitted to deprive a citizen of his rights and livelihood.

CONCLUSION.

For the reasons discussed herein Defendant urges that a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Delaware.

Respectfully submitted,

HENRY A. WISE, JR.,
905 Market Tower,
Wilmington, Delaware. 19801
Attorney for Petitioner.

ARLEN B. MEKLER,
Wilmington, Delaware,
Of Counsel.

APPENDIX "A".

IN THE

SUPREME COURT OF THE STATE OF DELAWARE

No. 151, 1972.

STANLEY A. LUKAS,

Defendant Below,
Appellant,

v.

STATE OF DELAWARE,

Plaintiff Below,
Appellee.

February 1, 1973

WOLCOTT, *Chief Justice;* CAREY and HERRMANN, *JJ.*, sitting.

Upon appeal from the Superior Court.

Henry A. Wise, Jr., of Booker, Green, Shaffer, Berl & Wise, Wilmington, for defendant below, appellant.

Mason E. Turner, Jr., Deputy Attorney General, Wilmington, for plaintiff below, appellee.

CAREY, *Justice:*

The appellant, Stanley Lukas, was convicted of receiving stolen property in violation of 11 Del. C. § 791. He seeks review of the Superior Court's denial of post-convic-

tion relief under Superior Court Criminal Rule of Procedure 35(a).

During the weekend of October 10-11, 1970, the building assembly area of Riblett Corporation in New Castle County was broken into and twelve axle parts, some brake drums, and eighteen tires and rims were stolen. On October 29, 1970, the Maryland State Police, investigating a separate crime involving Lukas, contacted the Delaware State Police for the purpose of obtaining a search warrant to search appellant's garage. Pursuant to the search warrant, the Delaware and Maryland police discovered the property stolen from Riblett, as well as other property which had been the object of the Maryland investigation.

I.

Lukas assigns error to the proof of value of the axles and drums at trial. Appellant urges that it was error to compute the value on a finished-product basis, rather than on a scrap-value basis, because the axles and drums were component parts while in Lukas's possession. The State urges that this question was not raised below and that since the appeal is before this Court on a Rule 35 motion, this Court is restricted to review only constitutional infirmities, not trial error.

11 Del. C. § 791 states that:

> "Whoever buys, receives or conceals any money, goods, or other things being the subject of larceny, to the value of $100 or more, which have been stolen or taken by robbery, knowing the same to have been stolen or taken by robbery, is guilty of a felony, and shall be imprisoned not more than three years."

An essential element of the felony is that the value of the goods must exceed $100.00. Without such allegation or

proof, the verdict must fall. The general rule that an appellate court cannot review questions not considered below is subject to a "plain error" exception. Where we are faced with a basic and fundamental error of the kind that requires review and rectification by this Court, we may take notice of such objection even if the defendant did not raise it below and would thus ordinarily be precluded from raising the point on appeal. *Wiggins v. State,* Del. Supr., 210 A. 2d 314, 316 (1965).

To determine value, 11 Del. C. § 793 requires the Court to compute value in stolen goods cases as provided by the law with respect to larceny. The larceny statute, 11 Del. C. § 633, requires that ". . . with respect to all other things being the subject of larceny, the value shall be the market value or replacement cost." A representative of Riblett Corporation testified that even though the stolen goods had been broken down into component parts, the parts represented six complete axle assemblies, each of which was worth $65.00; the total value of the stolen property therefore equalled $390.00. Lukas himself testified that he paid the unidentified seller the sum of $300.00 for these items.

It cannot be held that there was no valid evidence of the value of the items found in appellant's possession in the trial below or in the hearing on the Rule 35(a) motion; certainly, there is no plain error in this respect.

II.

Lukas also assigns error in the admission of certain testimony which he claims was hearsay. One of the police officers testified that he had double-checked, with the victim of the robbery, the serial number of a riding tractor which was also found in appellant's garage along with the axles, brake drums and tires. The owner of the tractor did not testify as to his ownership at trial. Lukas argues that the

officer's statement was circumstantial hearsay evidence and could not be admissible to prove scienter.

In reality, the officer testified that the tractor was one of the specific items which was the object of his investigation. His statement was not hearsay; it was testimony based on information he had gathered as a result of his investigation and was never admitted to prove the truth of statements made by other persons. No objection to this testimony was raised at the trial. In any event, the fact that, technically, some hearsay evidence may have been admitted does not, in this case, create a question of constitutional dimensions cognizable under a Rule 35 hearing. *Stein v. New York,* 346 U. S. 156, 196, 73 S. Ct. 1077, 1098 (1953); *California v. Green,* 399 U. S. 149, 155, 90 S. Ct. 1930, 1949 (1970); *Cf. Draper v. State,* Del. Supr., 146 A. 2d 796, 799 (1958); 16A C. J. S. Constitutional Law § 589 (1956).

The denial of the motion below will be affirmed.

APPENDIX "B".

IN THE

SUPREME COURT OF THE STATE OF DELAWARE

No. 151, 1972.

STANLEY A. LUKAS,
Defendant Below, Appellant,

v.

STATE OF DELAWARE,
Plaintiff Below, Appellee.

MOTION.

COMES Now the defendant by his Attorney, Henry A. Wise, Jr., and moves the Court for reconsideration and re-argument and specifically points out as follows:

At page 3 of the Court's opinion the correct statement is made as to the manner of computing the value. However, the owner testified that the value of the goods received by the defendant, that is the axles as broken down was nothing but junk and he could not state the junk value. Referring to the parts of the axles which the defendant received the owner testified as follows:

"Q. As far as you were concerned their value was simply as scrap at that point?

A. They were of no value at all to Schult Mobile Homes."

The Court further erred in stating that Mr. Lukas had testified that an unidentified seller sold these items to him for the sum of Three Hundred Dollars ($300.00). The testimony as shown on page 107-108 reads as follows:

> "The man delivered the axles along with a bulk load of tires to his residence several days later at which time he paid the unknown white male a total amount of $300 for the purchase."

Thus the amount of $300 related not just to the axles but to the axles plus a bulk load of tires. There is no break down as to what he paid for the axles. Nor is there any evidence from which the jury could have deduced the value of the axles, that is something by which they could have found what was paid for the bulk load of tires and then deducting this from $300 arrive at a figure in excess of $300.

HENRY A. WISE, JR.,
Henry A. Wise, Jr.,
905 Market Tower,
Wilmington, Delaware 19801
Attorney for Appellant

I certify that the attached Motion for reargument and reconsideration is presented in good faith and not for delay.

HENRY A. WISE, JR.
Henry A. Wise, Jr.

IN THE

SUPREME COURT OF THE STATE OF DELAWARE

No. 151, 1972.

STANLEY A. LUKAS,
Defendant Below, Appellant,

v.

STATE OF DELAWARE,
Plaintiff Below, Appellee.

ORDER.

AND NOW TO WIT this day of , A. D. 1973 the above Motion for reargument is hereby granted.

Justice.

APPENDIX "C".

SUPREME COURT OF DELAWARE

T. E. Townsend, Jr.
Clerk

Supreme Court Building
Dover, Delaware 19901

(302) 678-4155
(302) 734-3001

February 20, 1973

Henry A. Wise, Jr., Esq.
905 Market Tower
Wilmington, Delaware

Mason E. Turner, Jr., Esq.
Deputy Attorney General
Public Building
Wilmington, Delaware

Re: Stanley A. Lukas v. State, No. 151, 1972

Dear Sirs:

This is to notify you that the Petition for Reargument filed in the above case has been denied.

Yours truly,
T. E. Townsend, Jr.

APPENDIX "D".

"Q. Where are they?

A. I have since sold them for junk, for scrap iron, steel.

Q. You said they have you back all but one end?

A. Yes, sir.

Q. They gave you back how many ends?

A. Eleven.

Q. You sold them for scrap?

A. Yes, sir.

Q. How much did you get for them as scrap?

A. I don't know because there were other items involved. There were other items of steel in with the sale.

Q. As far as you were concerned their value was simply as scrap at that point?

A. They were of no value at all to Schult Mobile Homes."

APPENDIX "E".

"A. Mr. Lukas related that several weeks before he had been at Dan's service station on U. S. Route 40 east of Glasgow, Delaware where he had observed several axles of the same type that we recovered in the bed of a pickup truck operated by a white male 35 years old. He could not give us any further description of the man. Mr. Lukas made mention to the man that he could use items of a similar type for the purpose of reconstructing a trailer that he was building. Mr. Lukas made arrangements with the man for delivery of some of them to his home. The man delivered the axles along with a bulk load of tires to his residence several days later at which time he paid the unknown white male a total amount of $300 for the purchase."

APPENDIX "F".

MANDATE

THE SUPREME COURT OF THE STATE OF DELAWARE
TO THE HONORABLE THE JUDGES OF

The SUPERIOR COURT of the State of Delaware in and for New Castle County:

GREETING:

WHEREAS, before you or some of you in a cause entitled as follows:

State of Delaware
vs. No. 883, Cr. A. 1971
Stanley Lukas

a certain judgment or order was entered on the 5th day of July 1972, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on February 2, 1973, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby affirmed.

WITNESS the Honorable Daniel F. Wolcott, our Chief Justice, at Dover, the First day of January, A. D. 1973.

Issued February 20, 1973. .....
Clerk of the Supreme Court.